

## CHAPTER 23

# **MILITARY LITIGATION IN FEDERAL COURTS**

### **I. REFERENCES.**

- A. Federal Civil Judicial Procedure and Rules (West 2000).
- B. DOD Directive 5405.2, Release of Official Information in Litigation and Testimony by DOD Personnel as Witnesses (23 July 1985) (reprinted in Appendix C, AR 27-40).
- C. DOD Directive 5145.1, General Counsel of the Department of Defense (15 December 1989).
- D. Army Regulation No. 27-40, Litigation (19 September 1994).
- E. SECNAV Instruction 5820.8A, Release of Official Information for Litigation Purposes and Testimony by DON Personnel (27 August 1991).
- F. Manual of the Judge Advocate General (JAGMAN), JAGINST 5800.7C (3 OCT 90).
- G. Air Force Instruction 51-301, Civil Litigation (25 July 1994).
- H. United States Attorney's Manual, Department of Justice (OCT 1997 w/ June 1998 Update).

### **II. INTRODUCTION.**

### **III. RESPONSIBILITY FOR LITIGATION.**

- A. United States Department of Justice.
  - 1. Department of Justice (DOJ) exercises plenary authority over litigation involving the interests of the United States.

“Except as otherwise authorized by law, the conduct of litigation in which the United States, any agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to the officers of the Department of Justice, under the direction of the Attorney General.” **28 U.S.C. § 516.**

“Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States Attorneys, assistant United States Attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.”  
**28 U.S.C. § 519.**

2. Organization of the Department of Justice

- a) General.
- b) Civil Division.
  - (1) Federal Programs Branch.
  - (2) Torts Branch.
  - (3) Commercial Branch.
  - (4) Appellate Staff.

B. United States Attorneys.

- 1. One United States Attorney appointed by the President for each judicial district. **28 U.S.C. § 541.**
- 2. Assistant United States Attorneys (AUSA) are appointed by the Attorney General. **28 U.S.C. § 542.**
- 3. Responsibility of the United States Attorney.
  - a) General.

“[E]ach United States Attorney, within his district, shall . . .  
(2) prosecute and defend for the Government, all civil actions, suits or proceedings in which the United States is concerned.” **28 U.S.C. § 547.**
  - b) Retained and delegated cases.
- 4. Organization of the United States Attorney’s Office.

C. Department of Defense. Office of General Counsel.

1. Provide Litigation Coordination Among Military Departments and with DOJ.
  2. Determine DoD Position and Resolve Disagreements on Specific Legal Issues
- D. Department of the Army.
1. “Subject to the ultimate control of litigation by DOJ (including the various U.S. Attorney Offices), and to the general oversight of litigation by the Army General counsel, TJAG is responsible for litigation in which the Army has an interest.” Army Regulation 27-40, para. 1-4b.
  2. Within DA, the Chief, Litigation Division, has primary responsibility for supervising litigation of interest to the Army. AR 27-40, para. 1-4d
  3. Only attorneys designated by TJAG may appear as counsel before any civilian court or in any preliminary proceeding (i.e. deposition) in litigation in which the Army has an interest. AR 27-40, para. 1-6a. Requests for appearance as counsel are processed through Litigation Division to the Personnel, Plans, and Training Office, OTJAG. AR 27-40, para. 1-6b.
  4. Special Assistant U.S. Attorneys (SAUSAs) and DOJ Special Attorneys. See AR 27-40, para. 1-4e. Army judge advocate attorneys and civilian attorneys, when appointed as SAUSAs under 28 U.S.C. § 543, will represent the Army’s interests in either criminal or civil matters in Federal court under the following circumstances:
    - a) Felony and misdemeanor prosecutions in Federal Court.
    - b) SAUSAs for civil litigation.
    - c) Special Attorneys assigned by DOJ (only in civil litigation).
  5. Additional areas of DA involvement in litigation include:
    - a) Contract Law Division, OTJAG.

- b) Legal Representatives of the Chief of Engineers.
- c) Contract Appeals Division, USALSA.
  - (1) Trial Branch I and Bid Protest
  - (2) Trial Branch II
  - (3) Trial Branch III
- d) Regulatory Law and Intellectual Property Law Division, USALSA.
  - (1) Regulatory Law Office
  - (2) Intellectual Property Law Office
- e) Labor and Employment Law Office, OTJAG.
- f) Procurement Fraud Division, USALSA.
  - (1) Remedies Branch
  - (2) Litigation Branch
- g) Environmental Law Division, USALSA.
  - (1) Compliance and Policy Branch
  - (2) Litigation Branch
  - (3) Restoration and Natural Resources Branch
- h) Criminal Law Division, OTJAG.
- i) Litigation Division, USALSA.
  - (1) Military Personnel Branch.
  - (2) Civilian Personnel Branch.
  - (3) Torts Branch.
  - (4) General Litigation Branch.

- j) Responsibilities of Installation Staff Judge Advocates (SJA).
  - (1) Establish and maintain liaison with United States Attorney. AR 27-40, para. 1-5b.
  - (2) Advise Litigation Division by telephone of significant cases and those requiring immediate attention (e.g., temporary restraining orders, habeas corpus, cases with short return dates, cases alleging individual liability arising from performance of official duties, etc.). AR 27-40, paras. 3-1 and 3-3a.
  - (3) Forward by FAX or express mail to HQDA, a copy of all process, pleadings, and other related papers. AR 27-40, para. 3-3b.
  - (4) Notify the appropriate local U.S. Attorney upon receipt of process or initiation of court proceedings involving the installation or its activities and provide necessary assistance. AR 27-40, para. 3-3c.
  - (5) Assist federal employees sued for actions taken within the course and scope of their employment in securing DOJ representation. AR 27-40, paras. 3-4 and 4-4.
  - (6) Prepare investigative reports in appropriate cases. AR 27-40, paras. 3-9 and 4-4.
  - (7) Represent the United States in litigation when directed by the Chief, Litigation Division. AR 27-40, para. 1-4f.

E. Department of the Navy.

1. Navy JAGS

- a) Military Justice
- b) Administrative Law
- c) Civil Law
  - (1) General Litigation – Code 14
  - (2) Tort Claims and Litigation – Code 15

(3) Admiralty Litigation – Code 11

d) Operational/International Law

2. Navy General Counsel

a) Business & Commercial

b) Environmental

c) Civilian Personnel

d) Real Property

e) Patents

f) Procurements

3. SJAs Provide Litigation Reports IAW JAG Manual, Chapter II, 0210.

F. Department of the Air Force – AFI 51-301

1. General Litigation – JACL

2. Tort Claims and Litigation – JACT

3. Commercial Litigation – JACN

4. Environmental Litigation – JACE

5. Alternative Dispute Resolution – JACR

**IV. TYPES OF SUITS FILED AGAINST MILITARY DEPARTMENTS AND THEIR OFFICIALS.**

A. Subject-matter of Litigation.

1. Enlistments, inductions, activations.

2. Discharges.

3. Transfers and assignments.
4. Promotions.
5. Personnel policies.
6. Military programs.
7. Civilian personnel actions.
8. Installations management decisions.
9. Environmental compliance and remediation.
10. Bankruptcy (as a creditor).
11. Personal injury, death, or property damage caused by the negligence of Federal employees.
12. Civil challenges to courts-martial convictions (habeus actions, corrections of military records).
13. Contract disputes.
14. Freedom of Information and Privacy Act.
15. Federal and state administrative activities.

B. Types of Relief Sought.

1. Damages.
2. Mandamus.
3. Habeas corpus
4. Injunction
5. Declaratory judgment.

Perform a “systematic analysis” of the lawsuit: identify any legal theory which provides a basis for a dispositive motion **or** narrows the legal dispute to the advantage of the United States.

**V. METHOD OF ANALYSIS.**

- A. Sovereign Immunity: has the plaintiff asked for relief properly within a statutory waiver of sovereign immunity?
  - 1. Grants of jurisdiction.
    - a) Constitutional original jurisdiction. U.S. Const. Art. III. § 2.
    - b) Statutory grants.
      - (1) Federal Question Jurisdiction, 28 U.S.C. § 1331, is not a general waiver of sovereign immunity (see *infra* at “B”).
  - 2. Justiciable case or controversy. Is the matter a controversy appropriate for judicial inquiry? “Justiciability” is the term of art used to express the dual limitations imposed upon the federal courts by the Case or Controversy Doctrine. A two pronged doctrine:
    - a) Adversarial.
      - (1) Advisory opinions.
      - (2) Ripeness.
      - (3) Mootness.
      - (4) Standing.
    - b) Political question.
- B. Jurisdiction: the authority or power of the federal court to decide the case before it. Related to Sovereign Immunity; focuses on whether the court can grant the relief requested.
  - 1. Illustrative statutory grants of jurisdiction (limited waivers of Sovereign Immunity).



- a) The Tucker Act. 28 U.S.C. §§ 1346(a)(2) and 1491.
- b) The Federal Tort Claims Act. 28 U.S.C. §§ 1346(b) 2671-2680.
- c) Other Specialized Statutes.
  - (1) Government information management statutes (the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a).
  - (2) The Civil Rights Act. 28 U.S.C. § 1983.
  - (3) The Civil Rights Act of 1991. 42 U.S.C. § 1981.
  - (4) The Back Pay Act (civilians). 5 U.S.C. § 5596(b).
  - (5) The Military Pay Statute. 37 U.S.C. § 204.
  - (6) The Equal Access to Justice Act. 28 U.S.C. §§ 2412(b) and (d); 5 U.S.C. § 504.
  - (7) The Administrative Procedures Act. 5 U.S.C. §§ 701-706 (see below at “d)(3)”).
- d) Commonly asserted statutes that do not waive sovereign immunity for money damages:
  - (1) The Federal Question Jurisdiction Statute. 28 U.S.C. § 1331.
  - (2) The Civil Rights jurisdiction statute. 28 U.S.C. § 1343.
  - (3) The Mandamus statute. 28 U.S.C. § 1361.
  - (4) The Declaratory Judgment Act. 28 U.S.C. §§ 2201-2202.
  - (5) The Administrative Procedures Act. 5 U.S.C. §§ 701-706 (waiver only for nonmonetary claims).
  - (6) The Constitution. See, e.g., United States v. Testan, 424 U.S. 392 (1976).

2. Types of remedies (what did the plaintiff ask for; does his cited basis permit it?).

- a) Damages.
  - b) Mandamus.
  - c) Habeas corpus (see 28 U.S.C. §§ 2241-2255).
  - d) Injunctions (see Fed.R.Civ.P. 65).
  - e) Declaratory judgment.
- C. Exhaustion of administrative remedies: has the plaintiff pursued all intra-agency remedies?
- 1. Basic doctrine.
  - 2. Remedies available.
  - 3. Caveat: Darby v. Cisneros, 509 U.S. 137 (1993).
  - 4. Exceptions.
- D. Official Immunity and Judicial Bar.
- 1. Common Law Tort Lawsuit.
    - a) Statutory immunity under provisions of the Federal Employees Liability Reform and Tort Compensation Act (the “Westfall Act”), 28 U.S.C. § 2679.
    - b) Judicial Bar when the plaintiff is a service member and injury incident thereto. Feres v. United States, 340 U.S. 135 (1950).
  - 2. Constitutional Tort Lawsuit.
    - a) Judicial qualified immunity—Harlow v. Fitzgerald, 457 U.S. 800 (1982).
    - b) Exceptions to mere qualified immunity—Judicial Bar:

- (1) Judicial Bar when the activity is quasi-judicial, quasi prosecutorial. Butz v. Economou, 438 U.S. 486 (1978).
- (2) Judicial Bar when the plaintiff is a service member and injury incident thereto (Feres analysis applied in constitutional tort setting). Chappell v. Wallace, 462 U.S. 486 (1983).
- (3) Judicial Bar when the plaintiff is a civilian employee and the claim is subject to the Civil Service System. Bush v. Lucas 462 U.S. 367 (1983).

E. Reviewability: should the court review and decide the issues in controversy? Typical situations: challenges to court-martial jurisdiction over the person; alleged violation of the Constitution, a statute, or regulation.

1. Administrative Procedure Act, 5 U.S.C. § 701—exceptions to the general rule of applicability to the military:
  - a) Military Claims Act, 10 U.S.C. §§ 2733, 2735.
  - b) National Guard Claims Act, 10 U.S.C. § 715.
  - c) Civil Service Reform Act, 5 U.S.C. §§ 4301-4305.
  - d) Is action committed to agency discretion by law? 5 U.S.C. § 701(a)(2).
2. The "Mindes Test." Establishes a framework for courts to determine the reviewability of military activities. The Supreme Court has not explicitly adopted the "Mindes Test" and there is a split among the Circuits as to its applicability.
  - a) Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).
    - (1) Threshold allegations.
      - (a) Violation of a constitutional, statutory, or regulatory provision.
      - (b) Exhaustion of administrative remedies.

- (2) Balancing factors:
  - (a) Nature and strength of plaintiff's claim.
  - (b) Potential injury to plaintiff if review is refused.
  - (c) Interference with the military function.
  - (d) Degree of military expertise and discretion involved.
  
- b) Examples: Diekan v. Stone, No. 92-11309-Z, 1992 WL 390749 (D. Mass. 1992), aff'd, 995 F.2d 1061 (1st Cir. 1993); Guerra v. Scruggs, 942 F.2d 270 4th Cir. 1991).
  
- c) Application of Mindes in the federal courts.
  - (1) Courts that follow Mindes:
    - (a) 1st Circuit: Wright v. Park, 5 F.ed 586 (1st Cir. 1993); Diekan v. Stone, No. 92-11309-Z, 1992 WL 390749 (D. Mass. 1992), aff'd, 995 F.2d 1061 (1st Cir. 1993); Navas v. Vales, 752 F.2d 765 (1st Cir. 1985).
    - (b) 4th Circuit: Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Williams v. Wilson, 762 F.2d 357 (4th Cir. 1985).
    - (c) 5th Circuit: West v. Brown, 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978); but see Crawford v. Texas Army National Guard, 794 F.2d 1034 (5th Cir. 1986).
    - (d) 8th Circuit: Nieszner v. Mark, 684 F.2d 562 (8th Cir. 1982), cert. denied, 460 U.S. 1022 (1983).

- (e) 9th Circuit: Christoffersen v. Washington State National Guard, 855 F.2d 1288 (1988); Sandidge v. Washington, 813 F.2d 1025 (9th Cir. 1987); Khalsa v. Weinberger, 779 F.2d 1393 (9th Cir. 1985), aff'd, 787 F.2d 1288 (1986); Gonzalez v. Department of the Army, 718 F.2d 926 (9th Cir. 1983); Wallace v. Chappell, 661 F.2d 729 (9th Cir. 1981), rev'd on other grounds, 462 U.S. 296 (1983); but see Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc) (Mindes doctrine does not apply to equitable estoppel against the military), cert. denied, 111 S.Ct. 384 (1990).
- (f) 10th Circuit: Costner v. Oklahoma Army National Guard, 833 F.2d 905 (10th Cir. 1987); Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981).
- (g) 11th Circuit: Doe v. Garrett, 903 F.2d 1455 (11th Cir. 1990); Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987), cert. denied, 488 U.S. 959 (1988);
- (2) Courts that may follow Mindes:
  - (a) 6th Circuit: Schultz v. Wellman, 717 F.2d 301 (6th Cir. 1983); Renicker v. Marsh, 640 F. Supp. 244 (N.D. Ohio 1986).
  - (b) 7th Circuit: Ogden v. United States, 758 F.2d 1168 (7th Cir. 1985). Contra Knutson v. Wisconsin Air National Guard, 995 F.2d 765 (7th Cir. 1993), cert. denied, 114 S. Ct. 347 (1993). See also Wronke v. Marsh, 603 F. Supp. 407 (C.D. Ill. 1985), rev'd on other grounds, 787 F.2d 1569 (Fed. Cir. 1986), cert. denied, 479 U.S. 853 (1986).

- (c) D.C. Circuit: *Bois v. Marsh*, 801 F.2d 462, 474-75 (D.C. Cir. 1986) (Wald, J., dissenting); *Kreis v. Secretary of the Air Force*, 648 F. Supp. 383 (D.D.C. 1986), aff'd in part rev'd in part, 866 F.2d 1508 (D.C. Cir. 1989).

(3) Courts that do not follow Mindes:

- (a) 2d Circuit: *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976); *Mack v. Rumsfeld*, 609 F. Supp. 1561 (W.D.N.Y. 1985), aff'd, 784 F.2d 438 (2d Cir.), cert. denied, 479 U.S. 815 (1986). But see *Furman v. Edwards*, 657 F. Supp. 1243 (D. Vt. 1987) (suggesting Mindes consistent with 2d Circuit decisions).
- (b) 3d Circuit: *Jorden v. National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986); *Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981).
- (c) Federal Circuit/Court of Federal Claims: *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979).

F. Scope of review: to what extent should the federal court substitute its judgment for that of the military decision-maker? The unique character of the armed services influences the scope of review.

“We know that from top to bottom of the Army the complaint is often made . . . that there is objectionable handling of men. But judges are not given the task of running the Army. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be not to intervene in judicial matters.”

Orloff v. Willoughby, 345 U.S. 83, 93 (1953)

Typical situations: enlistment contracts, recruiter representations, conscientious objector determinations, challenges to agency interpretations of regulations or agency policies.

G. Trial on the merits.

**V. CONCLUSION.**

